2013 IL App (1st) 122680-U

FOURTH DIVISION
June 28, 2013

No. 1-12-2680

IN THE APPELLATE
COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

WILLIAM WHELEHAN, Plaintiff-Appellant, v. THE CITY OF CHICAGO, THE CITY OF CHICAGO POLICE DEPARTMENT, THE POLICE BOARD OF THE CITY OF CHICAGO, and GARRY McCARTHY, THE SUPERINTENDENT OF POLICE OF THE CITY OF CHICAGO, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 11 CH 40518 The Honorable Kathleen M. Pantle, Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Lavin and Justice Epstein concurred in the judgment.

ORDER

HELD: Police Board's administrative decision finding plaintiff guilty of the charges against him was not against the manifest weight of the evidence, and its administrative decision finding cause to discharge him from his employment was not arbitrary, unreasonable or unrelated to the requirements of service.

¶ 1 Following an administrative hearing, plaintiff-appellant William Whelehan (plaintiff) was terminated from his employment as a police officer, a decision which was affirmed by the trial court. Plaintiff brings this appeal against defendants-appellees the City of Chicago, the City of Chicago Police Department (Department), the Police Board of the City of Chicago (Board) and Garry McCarthy, the Superintendent of Police of the City of Chicago (defendants, or as named), contending that the trial court erred when it affirmed the administrative decision finding him guilty of the charges against him and when it affirmed the administrative decision to discharge him. He asks that we reverse the trial court's orders and that the matter be remanded for further proceedings or, alternatively, for any further appropriate relief. For the following reasons, we affirm.

¶ 2 BACKGROUND

¶ 3 A series of charges was filed against plaintiff, alleging violation of certain Department rules of conduct regarding incidents which took place on November 22, 2009, between him and civilian Kenneth James while plaintiff was off duty. The rules allegedly violated by plaintiff included impeding the Department's efforts to achieve its policy and bringing discredit upon the Department, disobeying an order, disrespecting a person, engaging in an unjustified verbal or physical altercation, making a false report and unlawfully using or displaying a weapon.

¶ 4 At an administrative hearing before a hearing officer, plaintiff testified that he had been a police officer with the City of Chicago since October 2004. On November 22, 2009, while he was off duty, he was walking his dog near 5357 North Natchez sometime before 6 p.m. He averred that he did not recall his dog urinating anywhere in that vicinity or anyone asking him not

to allow his dog to urinate there. He stated that he did not place a bag of dog feces on the stoop of 5357 North Natchez but, instead, that he accidentally dropped one nearby. Plaintiff testified that, as he reached the 5300 block of North Nagle, James drove up to him in his car, threw a bag of dog feces at plaintiff forcing him to move out of the way, pointed his finger at plaintiff and yelled, "if I ever see you by my house again, I'll put a bullet in your ass." Shocked by this, plaintiff asked, "what?," and James repeated his statement. When plaintiff responded, "I don't think so," James called him an "asshole" and other expletives. Plaintiff retorted by saying, "don't you fucking come near me, asshole," and continued walking his dog. Plaintiff denied using any racial slurs.

¶ 5 Plaintiff recounted that, at this point, he heard James slam his car door and he turned to see James exit the car and move towards him. Plaintiff averred that, as James moved toward the front of the driver's side, he bent down and reached toward his ankle. Plaintiff stated that, fearing for himself and his dog, he drew his gun from his waistband with his right hand and pulled out his badge with his left hand, announcing his office and ordering James to the ground. According to plaintiff, James smiled and started laughing and then began circling him with raised, clenched fists. As James continued to move closer to him, plaintiff repeated his office and order, but James refused to get down. Plaintiff called 911 twice while clipping his badge to his outerwear and reported that a black male was assaulting him.

¶ 6 Plaintiff further testified that when responding officers arrived at the scene, he told them that James approached him in a threatening manner telling him that he was going to shoot him, and that James reached toward his ankle as if reaching for a gun. After requesting a case report,

plaintiff met with a captain at police headquarters and eventually submitted a report in which he stated that James had posed an imminent threat of battery to him. He also submitted an officer's battery report claiming that James verbally threatened him. Later, plaintiff told the Independent Police Review Authority (IPRA) in an interview that James had threatened to shoot him, had made a furtive movement toward his ankle, and had circled him with raised fists. Plaintiff explained that he announced his office before displaying his weapon, that he had not encountered James before James first approached him in his car on North Nagle, and that he never used a racial slur against James.

¶ 7 James testified that, at about 8:30 p.m. on November 22, 2009, he was returning home to 5357 North Natchez when, as he pulled up to the side entrance of his house, he saw plaintiff near his garage with his dog. Plaintiff's dog urinated on a plant on James' property. James confronted plaintiff and told him not to let his dog do so; plaintiff responded by saying "whatever," and walked away. James went inside his home and, believing that plaintiff may return, continued to watch a monitor he had hooked up to his home surveillance system. After a while, James watched plaintiff on the monitor returning toward his home carrying a white plastic bag in his hands. On one of his four cameras, James saw plaintiff throw the bag, but could not see where it landed. When plaintiff appeared in the next camera, his hands were empty and he put them in his pockets. James opened his door and saw the white plastic bag on his stoop. He looked down the street and saw plaintiff turning the corner onto Nagle. James yelled after him, "you forgot something," but plaintiff did not stop. James picked up the bag, which contained dog feces, and got into his car to follow plaintiff.

¶ 8 James further testified that, when he reached plaintiff on Nagle, he threw the bag out of his car's passenger door and onto the sidewalk a few feet in front of plaintiff. Following an argument, plaintiff called James a "nigger," and continued to do so for a total of six times. James exited his car, walked onto the sidewalk and asked, "what did you say?" James spoke loudly and had his hands at his sides as he approached plaintiff; because plaintiff had a dog, James did not get closer than 18 to 20 feet. As James approached, plaintiff drew his gun, pointed it at James and told him to back up. James did not know that plaintiff was a police officer; plaintiff did not display a badge and did not announce his office. James backed up to the middle of the street and yelled for neighbors to call the police. At this point, plaintiff pulled out a cell phone and called the police himself. James heard him report that he was being assaulted and heard him give a number. Plaintiff continued pointing his gun at James for about 10 minutes until police arrived. Right before police approached, James saw plaintiff produce a badge for the first time from a chain around his neck and display it on his chest.

¶ 9 Police searched James, who was not carrying a weapon, as well as his car, and questioned him at the scene; no weapon was found and he was not arrested. James denied telling plaintiff he was going to “put a bullet in his ass,” as well as circling him with raised fists and reaching or bending down at any point toward his ankle. Officers told him he could file a complaint, which he did that night. Later, IPRA investigators interviewed James at his home. James showed them his surveillance system and the footage from that evening, which the investigators reviewed. However, due to the mechanics of the system, James was unable to make a copy of the footage, which was eventually self-overwritten.

¶ 10 In addition to plaintiff and James, a multitude of other witnesses testified at the administrative hearing, including several who were eyewitnesses to the incidents. Jannette Duenas, who lives at 5321 North Nagle, testified that she was returning home on the evening in question between 5 and 6 p.m. with her boyfriend, Emanuel Atkinson, and their young son. Atkinson had parked their car on the street in front on their house and had turned off the engine. At that time, Duenas, who was sitting in the front passenger seat, saw a car pull up across the street. The driver rolled down his car window, said "you forgot something at my house," and threw a white plastic bag out the driver's side window near the feet of a man who was walking his dog on the sidewalk. Duenas later identified the driver as James and the man on the sidewalk as plaintiff. As an argument ensued between the two men, Duenas rolled down her car window and could hear them clearly. She never heard James say "I'll put a bullet in your ass," but she did hear plaintiff say "fuck you, nigger" to James. Once plaintiff said this, Duenas saw James get out of his car and walk toward plaintiff, saying "what did you say?" Duenas estimated that James did not get closer than three feet from plaintiff; James spoke loudly, but had his hands "just down by him" and never bent down to reach toward his ankles. The next thing Duenas saw was plaintiff drawing a gun and pointing it at James, telling him to get down on the ground. James walked back toward his car with his hands in the air, saying "I have no weapons, don't shoot." A neighbor then ran outside yelling that she was calling the police, and Duenas ran inside with her son to call the police as well. She grabbed the telephone and returned to her door to look outside, whereupon she saw plaintiff show a badge for the first time. When police arrived, Duenas gave her statement, learning at that point that plaintiff was a police officer. Duenas testified that she

never heard plaintiff announce that he was an officer before he pulled his weapon and did not see him show his badge until her neighbor ran outside yelling that she was calling the police.

¶ 11 Similarly, Atkinson testified that he arrived home in his car to 5321 North Nagle that evening with Duenas and their son between 5 and 6 p.m. With his driver's side window rolled down, Atkinson saw a car pull up across the street. The driver, later identified as James, leaned out of his car and threw a white plastic bag about five feet from plaintiff, who had a dog with him, saying, "I think this belongs to you." As the men began to argue, Atkinson got out of his car. He could not remember exactly what the men said to each other, but testified that he never heard James say, "I'll put a bullet in your ass." At one point, plaintiff said something to James, whereupon James exited his car and started walking toward plaintiff with his hands outstretched saying, "what did you say to me?" James did not get closer to plaintiff than 10 to 13 feet, due to plaintiff's dog. Atkinson never saw James reach down toward his ankle. All of a sudden, plaintiff pulled out a gun and told James to get down on the ground. Atkinson never heard plaintiff identify himself as a police officer nor saw him present a badge. While Duenas took their son inside, Atkinson remained outside watching the confrontation. He never saw James circle plaintiff with his fists raised but, rather, the men stood face-to-face at a distance the entire time, with James asking neighbors to call the police. When another neighbor came outside and said she was calling, Atkinson saw plaintiff make a phone call on his cell phone. Atkinson then saw plaintiff reach into his shirt and pull out a badge on a string around his neck as police sirens could be heard approaching the scene.

¶ 12 Corroborating Duenas and Atkinson, neighbor Christine Medunycia, who lives at 5324

North Nagle, testified that she was outside in her backyard when she heard yelling after about 7 p.m. on the day of the incident. She went into her home and looked out her front window to see plaintiff walking his dog in front of her house and James parked in front of her neighbor's house. James got out of his car, appearing upset, and approached plaintiff; he had his hands "extended outward, like almost at his sides" with his palms out. Medunycia could not hear what the men were saying to each other, but she never saw James reach down toward his ankle at any point during the incident. Suddenly, plaintiff pulled out a gun; Medunycia did not see him show a badge or any other identification. She quickly opened her door and heard plaintiff tell James to get down. James stopped and began walking backwards toward his car. Medunycia yelled out that she was calling 911, whereupon she saw plaintiff pull out a cell phone and start dialing. She then heard James yell the question, "I'm assaulting you?" Medunycia stated that she did not learn that plaintiff was a police officer until responding officers told her later at the scene.

¶ 13 Regarding the investigation into the incidents, officer Leonard Impastato testified that he was on duty on the day in question and was called to respond to North Nagle regarding a man with a gun. Once there, officer Impastato interviewed plaintiff, who told him that James had threatened to shoot him and that James had gotten out of his car and had reached down toward his ankle as if reaching for a weapon. Plaintiff also recounted to him that he had announced his office when he drew his gun, thereby identifying himself as a police officer. Officer Impastato further testified that James did not have any weapon on him or in his car and that James was not arrested for any crime.

¶ 14 Sergeant David Rucci testified that he was also on duty that evening and responded to the

scene. Upon interviewing him, plaintiff explained that he first encountered James earlier that day and had a verbal altercation with him outside his house regarding plaintiff's dog. Sergeant Rucci averred that plaintiff then recounted the scene at North Nagle, telling him that when James got out of his car, he bent down toward his ankle as if he had a weapon after just having told plaintiff he was going to "put a bullet in [his] ass," and that this was why plaintiff drew his gun.

¶ 15 IPRA investigator Thomas Kalantzis testified that several days after the incidents, he and another investigator went to James' house to view the footage from his surveillance system. They watched the video and took notes. Investigator Kalantzis explained that he was not able to make a copy of the video, and that the system self-deleted the footage before James learned how to copy it. Investigator Kalantzis stated that on the video, he saw James parking his car at his home and going to his door when a man with a dog approached; the dog urinated on James' bush. James could be seen saying something to the man, the man acknowledged this, and then the man turned and walked away. Later, the video showed the man return to James' property with his dog, holding a white plastic bag. As he walked past James' door, the man threw the bag toward the doorway stoop. James then left the house, got in his car and drove toward Nagle.

¶ 16 Finally, plaintiff presented the testimony of several witnesses who ascribed to his character. For example, Sergeant Jon Hein testified that he supervised plaintiff several years ago as part of a response unit and found him to be fair, professional and honest, never submitting false reports or treating minorities differently than anyone else. Sergeant Thomas Rosenbusch testified that he believed plaintiff to be "level headed" and "even-keeled" and that he possessed a "good demeanor." Likewise, officers Shawn Flynn, Daniel Fowler, Megan Lyons and Andrew

Thomas all testified that plaintiff was mild-mannered, professional, honest and that they would not hesitate to work with him. And, Lawrence Kalter, plaintiff's friend, testified that plaintiff is "laid back and calm" and never rushes into anything.

¶ 17 Following the hearing, the Board read and reviewed the record of the proceedings and conferred with the hearing officer, who made an oral report. The Board found plaintiff guilty of all the charges against him. In its written decision, the Board made several credibility determinations, ultimately finding James' testimony credible and corroborated and plaintiff's testimony false. Specifically, it stated that James was credible when he testified: that he and plaintiff had a confrontation at his home and that plaintiff left dog feces on his stoop, as corroborated by investigator Kalantzis and Sergeant Rucci; that plaintiff called him a "nigger," as directly corroborated by Duenas; that plaintiff pulled his gun and pointed it at James but did not identify himself or show his badge until, or shortly before, police arrived at the scene, as corroborated by Duenas, Atkinson and Medunycia; and that James never said he was going to "put a bullet in [plaintiff's] ass," never circled plaintiff with his fists raised and never reached to his ankle, as, again, corroborated by Duenas, Atkinson and Medunycia. The Board stated that plaintiff, conversely, was not credible when he testified that he did not put the feces on James' stoop, that he did not call James a "nigger" and that he identified himself and showed his badge when he first pulled his gun. The Board also found that plaintiff testified falsely with respect to James' threat to shoot him, James' circling him with raised fists and James' reaching toward his ankle, and that plaintiff did so as "a pretext to attempt to justify his wrongful actions in pulling his gun and pointing it at James." In addition, the Board further determined that "James did

nothing that day which put [plaintiff] in fear of any assault and/or battery" and that plaintiff's filed reports about the incidents "contained false statements *** to attempt to conceal his wrongful conduct." Accordingly, after considering "the facts and circumstances of [plaintiff's] conduct, and the evidence presented in defense and mitigation," the Board ordered plaintiff's discharge, finding cause and concluding that his conduct was "sufficiently serious to constitute a substantial shortcoming" that would render his continued employment detrimental.

¶ 18 Upon administrative review, the trial court upheld the Board's findings and decision to terminate plaintiff's employment. After examining the evidence presented, the court noted that the Board made credibility determinations, including that James' testimony was corroborated by several witness, while plaintiff's testimony was not and, ultimately, "ma[de] no sense." Citing the applicable standard of review which prevents courts from reweighing an administrative agency's factual determinations, the court found that plaintiff had presented only minor conflicts, at best, in the evidence and that the manifest weight of the evidence supported the Board's decision. It also concluded that the Board's finding of cause to terminate "was not arbitrary and unreasonable nor was it unrelated to the requirements of service."

¶ 19 ANALYSIS

¶ 20 As noted, plaintiff presents two issues on appeal. His first contention is that the trial court erred when it affirmed the Board's decision finding him guilty of the charges against him. He asserts that the evidence leading to the guilty finding was "materially impaired and discredited" and, principally, that James' testimony "was contradicted by the other witnesses" and that the evidence favorable to him was ignored. He then contends that the trial court erred when

it affirmed the Board's decision to discharge him, asserting there was no "cause" and citing several cases where similar administrative decisions were reversed on appeal. We disagree with both of plaintiff's contentions.

¶ 21 As the Board comprises an administrative agency relegated to making decisions surrounding the employment of their own personnel, we note that, pursuant to the Administrative Review Law (735 ILCS 5/3-101 *et seq*. (West 2006)), it has discretionary authority in this regard. See, *e.g.*, *O'Boyle v. Personnel Board*, 119 Ill. App. 3d 648, 653 (1983), citing *Caldbeck v. Chicago Park District*, 97 Ill. App. 3d 452, 458 (1981); see also *Hanrahan v. Williams*, 174 Ill. 2d 268, 272-73 (1996). Judicial review of an administrative decision to discharge an employee requires a two-step approach. See *Walsh v. Board of Fire & Police Commissioners*, 96 Ill. 2d 101, 105 (1983); see also *Yeksigian v. City of Chicago*, 231 Ill. App. 3d 307, 310 (1992). First, we must determine whether the Board's findings of fact and decision were against the manifest weight of the evidence. See *Walsh*, 96 Ill. 2d at 105; *Yeksigian*, 231 Ill. App. 3d at 310. Second, we must determine whether those findings sufficiently support the Board's conclusion that cause for discharge or removal existed. See *Walsh*, 96 Ill. 2d at 105; *Yeksigian*, 231 Ill. App. 3d at 310.

¶ 22 Pursuant to this two-step approach, we turn first to plaintiff's contention that the evidence presented at his hearing was insufficient to support the findings against him. We begin, particularly with respect to the instant cause where plaintiff frames his issues on appeal as requiring review of the trial court's decisions, by noting the well-established principle that, in determining whether the Board's findings of fact are against the manifest weight of the evidence, we as the reviewing court are to examine only the Board's decision, not that of the trial court.

See *Daniels v. Police Board*, 338 Ill. App. 3d 851, 858 (2003); see also *Cesario v. Board of Fire, Police and Safety Commissioners of the Town of Cicero*, 368 Ill. App. 3d 70, 74 (2006). Accordingly, and in addition, the Board's findings are considered to be *prima facie* true and correct, and we may not reweigh the evidence or make any independent determinations of fact. See *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 88 (1992); *O'Boyle*, 119 Ill. App. 3d at 653 (the agency is "charged with the primary responsibility of adjudication in [its] specialized area"); see also *Caliendo v. Martin*, 250 Ill. App. 3d 409, 416 (1993) (these activities are not the function of the court, but rather, are only for the agency). Thus, we may not substitute our judgment for that of the Board here. See *Abrahamson*, 153 Ill. 2d at 88. Nor is reversal of the Board's decision justified simply because the opposite conclusion is reasonable or because we might have ruled differently. See *Abrahamson*, 153 Ill. 2d at 88; *Caliendo*, 250 Ill. App. 3d at 416 (this is not sufficient to set aside the agency's decision). Instead, in order for us to find that the Board's decision is truly against the manifest weight of the evidence, we must be able to conclude that " 'all reasonable and unbiased persons, acting within the limits prescribed by the law and drawing all inferences in support of the finding, would agree that the finding is erroneous' [citation] and that the opposite conclusion is clearly evident." *O'Boyle*, 119 Ill. App. 3d at 653, quoting *Daniels v. Police Board*, 37 Ill. App. 3d 1018, 1023 (1976) and *Jenkins v. Universities Civil Service Merit Board of the State Universities Civil Service System*, 106 Ill. App. 3d 215, 219 (1982); see also *Abrahamson*, 153 Ill. 2d at 88 (the agency's decision is against manifest weight "only if the opposite conclusion is clearly evident"); *Yeksigian*, 231 Ill. App. 3d at 310 (the agency's decision is not against manifest weight "unless

the opposite conclusion is clearly evident *** and, no rational trier of fact, viewing the evidence in the light most favorable to the [agency], could have agreed with the *** determination"). This is an exacting standard and, if there is anything in the record which fairly supports the Board's conclusion, it is not against the manifest weight of the evidence and must be sustained. See *Finnerty v. Personnel Board*, 303 Ill. App. 3d 1, 12 (1999) (if there is evidence in record to support the agency's decision, it must be affirmed); *Caliendo*, 250 Ill. App. 3d at 416.

¶ 23 Furthermore, and also quite relevant to the instant cause where witness credibility is at issue, the Board's decision in that respect must be sustained. See *Yeksigian*, 231 Ill. App. 3d at 311; *Caliendo*, 250 Ill. App. 3d at 416 (when it comes to witness testimony before the agency, weight and credibility to be given it lies solely "within the province of" the agency); accord *Finnerty*, 303 Ill. App. 3d at 12 (this is "uniquely within" the agency's determination). Thus, as it is the Board's function here to assess the credibility of the witnesses who testified at plaintiff's hearing, we may not interfere in that determination. See *Caliendo*, 250 Ill. App. 3d at 417; accord *Hillard v. Bagnola*, 297 Ill. App. 3d 906, 916 (1998) (agency is "in the best position to settle any issues of credibility"); *Haynes v. Police Board*, 293 Ill. App. 3d 508, 511-12 (1997) (established law leaves credibility issues for administrative agency only).

¶ 24 Our review of the record leads us to conclude, contrary to plaintiff's assertion, that the Board had before it more than sufficient evidence to support its findings of credibility and that plaintiff was guilty of the charges levied against him.

¶ 25 The Board's first finding was that plaintiff violated Rule 2 of the City of Chicago Police Department Rules of Conduct, which prohibits any act that "impedes the Department's efforts to

achieve its policy *** or brings discredit" on the Department, when he: left the bag of dog feces on James' stoop; called James a "nigger;" failed to announce his office when drawing his weapon; falsely reported to 911 that James was assaulting him, to responding officers that James threatened to shoot him and reached toward his ankle as if reaching for a gun, and completing a report asserting that James verbally threatened him; and falsely stating in his interviews with the IPRA that James threatened to shoot him, made a furtive move toward his ankle, and circled him with raised fists while also falsely stating that he announced his office and displayed his badge, did not call James a "nigger," and only first encountered James on North Nagle. The evidence presented at the hearing clearly supports all these bases for a finding of plaintiff's violation of Rule 2. That is, not only did James testify with respect to each of these bases, but he was independently corroborated on each of them by multiple witnesses. Investigator Kalantzis corroborated James' account of what occurred at his home when he testified that he saw plaintiff on the video surveillance footage walk past James' doorway and flick a white plastic bag onto his stoop. Duenas corroborated James' testimony that plaintiff called him a "nigger" when she stated that she clearly heard plaintiff do so through her rolled-down car window after she saw James throw the bag at plaintiff's feet. Duenas, Atkinson and Medunycia all consistently testified that they never heard plaintiff announce his office or display a badge until shortly before responding police arrived. They all further corroborated James, and all contradicted plaintiff's reports to authorities, when they testified that James did not assault plaintiff, did not threaten to shoot plaintiff, did not circle plaintiff with raised fists and never reach down toward his ankles. And, Sergeant Rucci confirmed that plaintiff told him at the scene that he had more than one

confrontation that evening with James, not simply the one on North Nagle, in direct contravention of plaintiff's reports and his testimony at the hearing.

¶ 26 Next, the Board found that plaintiff violated Rule 6 of the Rules of Conduct which prohibits the disobedience of an order or directive, either written or oral, when he failed to identify himself as a police officer as he drew his weapon. As we have just discussed, not only did James testify that plaintiff never announced his office nor showed a badge when he pulled his gun, but Duenas, Atkinson and Medunycia all corroborated his testimony. Duenas stated that plaintiff drew his gun and pointed it at James when James got out of his car, but never heard him announce his office; he did not show his badge until Medunycia ran outside screaming that she was calling the police and Duenas did not learn he was an officer until she spoke to responding officers after the incident on North Nagle was over. Similarly, Atkinson testified that he never heard plaintiff announce his office when he pulled his gun, but saw him reach into his shirt and pull out a badge on a string around his neck only after police sirens could be heard approaching the scene. And, likewise, Medunycia described that she did not see plaintiff show a badge or any other identification when he pulled his gun on James and did not learn that plaintiff was a police officer until responding officers told her later at the scene.

¶ 27 The Board also found plaintiff guilty of violating Rules 8, 9, 14 and 38, which prohibit maltreating any person while on or off duty, engaging in unjustified verbal or physical altercations while on or off duty, making false reports either written or oral, and unlawfully and unnecessarily displaying a weapon. Independent of James' testimony, these findings were clearly supported by Duenas' testimony of plaintiff's use of the word "nigger" against James, as well as

by the consistent and corroborative testimony of Duenas, Atkinson and Medunycia who witnessed the confrontation between James and plaintiff and saw plaintiff suddenly draw a gun and aim it at James while James was several feet away from plaintiff and had his arms down and his hands palms-out, as we have already described above.

¶ 28 Plaintiff's basis for his claim of reversal of the findings against him is his assertion that James' testimony was not corroborated and was, instead, "contradicted by the other witnesses." After boldly claiming that James "is a very strange individual" and characterizing him as "angry, loud[and] unstable," he points to differences in the witnesses' testimony with respect to the time of day of the incidents, their location, the distance maintained between him and James, the use of a racial slur and the manner in which James threw the bag of dog feces at him. However, while plaintiff raises these differences on appeal, we find that they are nothing more than minor variations in the witnesses' testimony and in no way warrant the reversal of the findings against him here. Rather, at best, they amount to only conflicting evidence on insignificant points that were wholly irrelevant to the events that occurred.

¶ 29 For example, as plaintiff notes, James testified that his first confrontation with plaintiff at his home occurred at 8:30 p.m. and that the confrontation on North Nagle occurred at 9:30 p.m. But, Duenas and Atkinson testified the incident there happened sometime between 5 and 6 p.m., Medunycia stated it happened after 7 p.m., and evidence records of the 911 calls placed from North Nagle show that it happened around 6 p.m. He also raises a difference in the location of the incidents, with the confrontation on North Nagle happening in front of Medunycia's home at 5322 North Nagle rather than in front of Duenas and Atkinson's home at 5321 North Nagle, an

address which was referred to throughout the hearing. Plaintiff insists that the differences in time of day "seriously undermine[]" James' credibility and that the differences in location were "inaccurate and very misleading." However, these slight discrepancies hardly form a basis for reversal. No one, not even plaintiff, disputes that the incidents at issue all occurred in the early evening hours of November 22, 2009. Moreover, no one, and again not even plaintiff, disputes that the second confrontation between him and James occurred in the same vicinity of North Nagle–with plaintiff on the sidewalk in front of Medunycia's home at 5322 directly across the street from Duenas and Atkinson's home at 5321, and with James in the middle of the street between these two locations. It is also important to note that all of the eyewitnesses were consistent in their testimony with respect to their vantage points of the incident: Duenas and Atkinson testified that they were parked on the side of North Nagle in front of their home at 5321, Medunycia testified that she was watching the events from her front window at 5322, and Duenas and Atkinson both testified that it was Medunycia, their neighbor from across the street, who interrupted the incident by screaming that she was calling 911. We fail to see how any difference in testimony regarding the time of day or the location of the confrontation between plaintiff and James has any relevance in light of the corroborated facts here particular to the incident on North Nagle.

¶ 30 The same is true regarding plaintiff's notations with respect to the distance that separated him and James. It is true, as he states, that James testified he was between 18 and 20 feet from plaintiff during the incident on North Nagle, but that Duenas testified he was only 3 feet away. Plaintiff claims that, due to this difference, any "reliance on the testimony *** to corroborate the

testimony of James is misplaced." Again, this is nothing but a minor inconsistency in the evidence presented and is of little consequence here. Rather, what is relevant is that all of the eyewitnesses testified, in corroboration with each other and with James, that James remained at a distance from plaintiff, that no physical contact was ever made and that James never reached or made any movements toward his ankle or circled plaintiff with raised fists.[1] And, significantly, Duenas, Atkinson and Medunycia all testified that James got out of his car and approached plaintiff at a distance with his hands visible and out; at no time did James drop his hands or reach down toward his ankles.

¶ 31 Plaintiff's next claim of conflicting evidence meriting the reversal of his cause focuses on the use of a racial slur. As plaintiff states, James testified that plaintiff called him a "nigger" no fewer than six times during the incident on North Nagle, while Duenas testified she only heard plaintiff say this once and Atkinson and Medunycia testified they did not hear plaintiff say the word at all. From this, plaintiff labels James' account as an "incredible piece of testimony." However, we find this to be highly conclusory and, quite frankly, irrelevant. Distinctly, Duenas, who testified that she was clearly able to hear the confrontation from her rolled-down car window from the moment James pulled up in his car, corroborated James' testimony that plaintiff called him a "nigger" and that he did so, as James testified, while James was still in his car. She further stated that, as the confrontation grew more heated, James and plaintiff began

[1] We note for the record that Atkinson testified James remained 10 to 13 feet away from plaintiff during the incident on North Nagle. Plaintiff fails to cite this in his argument here. Atkinson's testimony on this point, again, corroborates James' account. Even if it did not, however, as we have just discussed, plaintiff's claims regarding the distance maintained between him and James are irrelevant in light of the corroborative evidence presented.

yelling over each other and she could no longer heard exactly what was being said. Fundamentally, whether plaintiff used this racial slur six times as James recalled or only once as Duenas testified she heard before the yelling, the evidence is clear that plaintiff, a police officer, used this incredibly derogatory word against a civilian citizen. Moreover, any characterization by plaintiff that Atkinson and Medunycia's testimony of never having heard him say the word must support his claims here is wholly incorrect. Neither Atkinson nor Medunycia testified that they did not hear the word "nigger" because plaintiff did not say it but, rather, because they were not in a position to hear what James or plaintiff said at all; Atkinson stated he did not remember exactly what was said and Medunycia stated she was at first in her backyard and later inside her house, and thus, out of the range of hearing for the majority of the confrontation.

¶ 32 Plaintiff's final citation of discrepancy is that, while James testified he threw the white plastic bag containing dog feces which plaintiff had left on his stoop out of the passenger side door of his car when he first confronted him on North Nagle, Duenas testified that she saw James throw it at plaintiff through his driver's side window. Plaintiff then states in his brief that, "[w]hile it is clear that [James] threw a bag of feces at [him], the remainder of the facts relating to the throwing of the feces and the other events at the time are very unclear and not corroborated." This presents yet another illogical leap in plaintiff's conclusions here. Again, this difference in testimony is only a minor discrepancy that is simply not relevant to the instant cause. Rather, what is relevant is that all the eyewitnesses, as well as plaintiff and James himself, for that matter, testified that James threw the white plastic bag at plaintiff. He did so while he was still inside his car and, as corroborated by the eyewitnesses and disputed only by plaintiff, he

threw it not at plaintiff but only near his feet and in his pathway. Again, James' throw never hit plaintiff which could have caused a battery as plaintiff reported to authorities, nor did James throw the bag at plaintiff in such a way that would have required plaintiff to move so as not to be hit which could have, perhaps in some fathomable way, justified plaintiff's drawing of his gun.

¶ 33 As we noted earlier, we may not interfere with the Board's determinations with respect to the credibility of the witnesses who testified in this cause. See *Caliendo*, 250 Ill. App. 3d at 417; accord *Hillard*, 297 Ill. App. 3d at 916; *Haynes*, 293 Ill. App. 3d at 511-12. The Board chose to believe the facts as presented by James and as corroborated by Duenas, Atkinson, Medunycia, Sergeant Rucci and investigator Kalantzis. Thus, what occurred on North Nagle is clear. After plaintiff initially brushed off a confrontation with James about his dog urinating on James' property, James watched as plaintiff returned to his home and threw a white plastic bag full of dog feces onto James' doorstep. After trying to catch plaintiff, James retrieved the bag, got in his car and followed him to North Nagle, where he threw the bag toward plaintiff's feet. Words were then exchanged, whereupon plaintiff used a racial slur against James, who got out of his car to confront plaintiff. Suddenly, and without announcing his office or displaying his badge, plaintiff pulled out his gun and aimed it at James, who put his hands up and retreated to his car while asking neighbors to call the police. It was only when neighbors began to do so and sirens could be heard that plaintiff, who also called 911, finally pulled out his badge and displayed it on his chest.

¶ 34 Plaintiff did present several witnesses at his hearing. The Board specifically stated in its decision that it considered these witnesses' testimony and plaintiff's presentation of them in

relation to his version of the events. However, all of these witnesses on plaintiff's behalf were character witnesses; they only testified to plaintiff's general honesty and professionalism. While this is somewhat relevant, none of them were eyewitnesses to the events of that day. Most critically, plaintiff presented no witness or evidence that supported his account of what occurred, namely, that James threatened to "put a bullet in his ass," that James reached down or made a furtive movement toward his ankle as if he had a weapon, that James circled him with raised fists, or that plaintiff announced his office and displayed his badge the moment he reached for his gun. In addition, plaintiff rendered his own testimony incredible when he stated at his hearing and in certain reports and interviews he filed with authorities that he had not encountered James earlier that day in front of his home; yet, he did recount this event to Sergeant Rucci at the scene on North Nagle and it was later confirmed by investigator Kalantzis' viewing of the video surveillance footage. While the Board did consider plaintiff's evidence, it simply did not overcome the detailed, independent and corroborative evidence presented demonstrating that he committed various acts in violation of multiple rules of conduct during the events of that evening.

¶ 35 Ultimately, where there is ample evidence in the record to fairly support the Board's findings and conclusions, its decision must be sustained. See *Finnerty*, 303 Ill. App. 3d at 12; *Caliendo*, 250 Ill. App. 3d at 416. Here, not only was the evidence ample, but it was overwhelming, independent and corroborative in every relevant detail. Accordingly, based on our review of the record before us, and in the light most favorable to the Board, we conclude that the Board's decision finding plaintiff guilty of violating several rules of conduct was not against

the manifest weight of the evidence.

¶ 36 Plaintiff's second contention on appeal is that the Board's decision to discharge him from his employment was improper.[2] Coincidentally, this is the second step in our two-step approach of the judicial review of an administrative decision to discharge an employee; that is, we must now determine whether the findings of the Board, which we have just concluded were not against the manifest weight of the evidence, sufficiently support its conclusion that cause for plaintiff's discharge and removal as a police officer existed. See *Walsh*, 96 Ill. 2d at 105; *Yeksigian*, 231 Ill. App. 3d at 310-12. Based on our thorough review of the record here, we find that they did.

¶ 37 "Cause"–the foundation for discharge–encompasses a shortcoming which renders a police officer's continued employment with the department a detriment to the discipline and efficacy of the police force and which the law and sound public opinion recognize as a good reason for him to not occupy that position. See *Yeksigian*, 231 Ill. App. 3d at 312; accord *Walsh*, 96 Ill. 2d at 105; see also *Caliendo*, 250 Ill. App. 3d at 418 (cause exists where misconduct "manifests a disrespect for the law and tends to undermine public confidence in the honesty and integrity of the police force"). The existence of sufficient cause is a question for the Board to determine. See *Department of Mental Health and Developmental Disabilities v. Civil Service Commission*, 85 Ill. 2d 547, 551-52 (1981). Therefore, the Board's finding of cause "commands our respect" and substantial deference, and neither we nor the trial court may substitute judgment for that of

[2]Just as his first argument, plaintiff frames this contention in his appellate brief while focusing on the trial court, asserting that the "trial court erred when it affirmed" the Board's decision to discharge him. As we noted earlier, in cases such as the instant cause, we do not review the trial court's decision but, rather, that of the Board. See *Daniels*, 338 Ill. App. 3d at 858; accord *Cesario*, 368 Ill. App. 3d at 74.

the Board in this regard. See *Walsh*, 96 Ill. 2d at 105-06; *Yeksigian*, 231 Ill. App. 3d at 312; see also *Launius v. Board of Fire and Police Commissioners of the City of Des Plaines*, 151 Ill. 2d 419, 436 (1992) (citing *Sutton v. Civil Service Commission*, 91 Ill. 2d 404, 411 (1982) (reviewing court may not overturn decision of discharge simply because it would have been more lenient or would have considered mitigating circumstances differently to impose lesser discipline). Ultimately, the Board's finding of cause may be overturned only if it is " 'arbitrary and unreasonable or unrelated to the requirements of service.' " *Yeksigian*, 231 Ill. App. 3d at 312 (quoting *Allman v. Police Board of the City of Chicago*, 140 Ill. App. 3d 1038, 1040 (1986)); see also *Kappel v. Police Board*, 220 Ill. App. 3d 580, 590 (1991) (Board, rather than courts, are better able to determine effect of officer's misconduct on proper operation of department).

¶ 38 Even a single finding of a violation of a single police departmental rule may be sufficient cause for discharge or removal. See *Siwek v. Police Board*, 374 Ill. App. 3d 735, 738 (2007); *Caliendo*, 250 Ill. App. 3d at 418 (and cases cited therein); see also *Finnerty*, 303 Ill. App. 3d at 12 (one violation alone was sufficient cause for discharge). This includes, for example, an officer's misuse or unnecessary display of his firearm, and his making false statements, misrepresentations or omissions to authorities. See, *e.g.*, *Walsh*, 96 Ill. 2d at 106 (reckless and irresponsible display of weapon is more than enough to warrant discharge, since "[a] police officer hardly can commit a more serious offense than misuse of his gun," which "undermines public confidence in" his ability and good judgment); *Sindermann v. Civil Service Commission of the Village of Gurnee*, 275 Ill. App. 3d 917, 928-29 (1995) ("cause *** has been found where a police officer lies to his employer"); *Nelmark v. Board of Fire and Police Commissioners*, 159

Ill. App. 3d 751, 759 (1987) ("the filing of a false report has *** been held to constitute cause for discharge" from department); see also *Kappel*, 220 Ill. App. 3d at 590-91 (discharge for failure to maintain discipline and efficacy of department is proper). Such scenarios have been determined to reflect immaturity, irresponsibility, dishonesty, and precisely the type of behavior that is detrimental to the discipline of policing our cities. See *Walsh*, 96 Ill. 2d at 106; *Sindermann*, 275 Ill. App. 3d at 929. And, it does not matter whether the conduct was committed while the officer was on or off duty. See *Remus v. Sheahan*, 387 Ill. App. 3d 899, 904 (2009) (citing *Davenport v. Board of Fire & Police Commissioners*, 2 Ill. App. 3d 864, 869-70 (1972) (as officer is constantly in public eye, for the good of his department, he must, at all times, exercise sound judgment and uphold his responsibilities to the public and the department).

¶ 39 Applying these principles to the instant cause, we conclude that the Board's decision was not excessive, unduly harsh or unrelated to the needs of service. To the contrary, based on the record before us, sufficient cause existed to support plaintiff's termination from his employment. The facts clearly demonstrate that, after being confronted for allowing his dog to urinate on James' property, plaintiff, a police officer sworn to protect and serve the citizens of Chicago, returned to throw a bag of feces on James' doorstep. Not only did James witness this, but it was captured on video surveillance footage which was later viewed by authorities. While plaintiff's act, reminiscent of an immature teenage prank, was bad enough, he took his behavior to further lows when, after again being confronted by an unarmed James who was several feet away and sitting in his car, he used an unspeakable racial slur against him and then pulled out his service weapon and aimed it at this man who had his hands visibly out, doing so without ever

announcing his office or showing his badge. Not only was plaintiff not confronted with an assault or threatening physical contact, but he pulled out his gun when there were several innocent neighbors in close proximity to him, including a young boy. And, on top of all this, plaintiff then decided to lie to his superiors, filing false oral and written accounts of what happened on the day in question which subjected James to undue suspicion and treatment as a criminal.

¶ 40 Plaintiff devotes the majority of his brief on appeal to a discussion of several police board cases wherein the boards' decisions finding cause to justify termination from employment were overturned. He then compares his cause to these and asserts, essentially, that his actions were less inappropriate or improper and, thus, his punishment was clearly excessive. However, "the fact that different individuals have been disciplined differently is not a basis for concluding that an agency's disciplinary decision is unreasonable; such conclusions are appropriate only when individuals receive different disciplines in a single, identical, 'completely related' case." *Siwek*, 374 Ill. App. 3d 738 (quoting *Launius*, 151 Ill. 2d at 441-42). The punishment issued by an administrative agency in another case, then, is relevant only when that case is completely related to the cause at hand, namely, when it involves the same identical incident. See *Launius*, 151 Ill. 2d at 441-42. Clearly, in order to even initiate a comparison of different disciplines received by different officers, there must have been a single, identical set of circumstances arising from a completely related case which resulted in the imposition of those different disciplines. And, even then, it does not matter whether one employee was discharged and the other was not; cause, and the punishment issued, depend solely on the facts presented as considered by the agency. See

Launius, 151 Ill. 2d at 442. The incidents at hand involved only one officer–plaintiff–and, as such, no comparison of the cases he cites is relevant to our review.

¶ 41 Therefore, without more, we will not substitute our judgment for that of the Board in the instant cause. See, *e.g.*, *Walsh*, 96 Ill. 2d at 105-06; *Yeksigian*, 231 Ill. App. 3d at 312. Rather, pursuant to the record before us and contrary to his contention, we cannot conclude that the Board's finding of cause for discharge of plaintiff from his employment as a police officer based on his actions as detailed and witnessed here was arbitrary, unreasonable or unrelated to the requirements of service.

¶ 42 We wish to make one final notation for the record. Within the pages of his two main contentions in his brief on appeal, plaintiff asserts that "the trial court should have entered judgment" in his favor because defendants here "failed to compile and file the 'entire record of proceedings' as required by 735 ILCS 5/3-108(b) and 5/3-106." Essentially, he argues that, because defendants did not submit the hearing officer's oral report made to the Board, it was improper for the Board to rely on it in its decision and he was denied his right to a full, fair and impartial administrative review of his cause. With respect to this final matter, we, again, disagree.

¶ 43 During the procedural posture of this cause, plaintiff filed a "Motion for Judgment" in the trial court, asserting the same claim we have just recited, *i.e.*, that defendants failed to compile and file the entire record because the hearing officer's oral report to the Board is missing. Following responses filed by defendants, the trial court denied plaintiff's motion. In its order, the court stated that it found the record to be sufficiently complete for its review and that, as it was

required to examine only the evidence used by the Board in reaching its holdings and as the hearing officer's recommendation was privileged and not considered evidence, the recommendation's absence from the record did not merit judgment for plaintiff.

¶ 44 The trial court's decision was correct. It is the Board's responsibility to provide the trial court on administrative review with the appropriate documentary evidence it used in arriving at its decision so that the court may determine whether the Board's decision was correct. See *Mueller v. Board of Fire and Police Commissioners of Village of Lake Zurich*, 267 Ill. App. 3d 726, 733-34 (1994) (this allows trial court to perform its function of judicial review). The trial court does this by examining whether sufficient grounds exist in the record to justify the Board's decision. See *Santana v. State Board of Elections*, 371 Ill. App. 3d 1044, 1057 (2007). Significantly, our courts have held that, while due process in the context of administrative review requires a hearing officer to convey his findings and conclusions to the decision-making body via either an oral or written report, it does not require this report to then be made available to the parties. See *Starnawski v. License Appeal Commission of the City of Chicago*, 101 Ill. App. 3d 1050, 1054 (1981) (citing *Ramos v. Local Liquor Control Commission of the City of Chicago*, 67 Ill App. 3d 340, 344-45 (1978)).

¶ 45 From our review of the trial court's lengthy and detailed decision in the instant cause, we find that the record before it was more than sufficient and that there were ample grounds for it to properly and thoroughly examine, and ultimately agree with, the Board's decision on administrative review. The record was comprised of the transcripts of the hearings, including the witnesses' testimony which was central to the instant cause. Also included was documentary

evidence and the Board's findings and orders, which incorporated its final decision. In the end, a hearing officer's recommendation is not determinative of the agency's decision; the agency may accept or reject any of the hearing officer's recommendation and is free to make its own decision based on the evidence of record. See, *e.g.*, *Comprehensive Community Solutions, Inc. v. Rockford School District No. 205*, 351 Ill. App. 3d 1109, 1114-15 (2004) (citing *Gounaris v. City of Chicago*, 321 Ill. App. 3d 487, 492 (2001)) (hearing officer only recommends findings and potential disposition to agency, which must make its own decision based on record and may accept or reject the recommendation; it is the agency's decision that is entitled to deference, not that of the hearing officer, even with respect to findings of fact); accord *Starnawski*, 101 Ill. App. 3d at 1054 (citing *Ramos*, 67 Ill. App. 3d at 344-45) (it is the agency and not the hearing officer that is responsible for the ultimate decision). Accordingly, the record, as presented to the trial court here, was more than sufficient to support the Board's decision and, in turn, to aid in our review as well.

¶ 46 CONCLUSION

¶ 47 For the foregoing reasons, we affirm the Board's decision, as well as the judgment of the trial court, and uphold plaintiff's termination from employment.

¶ 48 Affirmed.